

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)
)
Petition Filed by the National Association of) MB 04-160
Broadcasters Regarding Programming Carried)
by Satellite Digital Audio Radio Services.)

To: The Commission
June 21, 2004

REPLY COMMENTS OF STATE BROADCAST ASSOCIATIONS

The forty-four state broadcast associations listed below (the "State Associations") hereby submit these Reply Comments in the above captioned proceeding. The State Associations reply to the Opposition filed by Sirius Satellite Radio Inc. and XM Radio Inc. (the "Satellite Radio Licensees"), and the Opposition filed by the Satellite Broadcasting and Communications Association (the "SBCA").¹

The State Associations again urge the Commission to grant the National Association of Broadcasters' ("NAB") Petition for Declaratory Ruling in order to prevent the Satellite Radio Licensees from offering unauthorized local programming such as traffic and weather reporting which, if left unchecked, could jeopardize the future of free broadcasting and irreparably harm the public interest by confusing and misleading listeners and, indeed, putting their lives in jeopardy. The Commission's obvious statutory authority to limit the Satellite Radio Licensees' use of the radio spectrum is not precluded by the First Amendment and should be exercised in this instance. At the very least, however, the Commission should order the Satellite Radio Licensees to cease providing local programming while it reopens the Satellite Digital Audio

¹ See *Opposition of Sirius Satellite Radio Inc. and XM Radio Inc.*, Docket No. MB 04-160, (June 4, 2004); *Opposition of Satellite Broadcasting and Communications Association*, Docket No. MB 04-160, (June 4, 2004).

Radio Systems (“SDARS”) proceedings in order to collect an accurate record and to evaluate the consequences of allowing satellite radio to offer the semblance of localized programming which it has not done previously.

I. Satellite Radio Licensees’ Weather and Traffic Programming is Inherently Local and SDARS Provision of it Constitutes a Controversy and Uncertainty.

The Satellite Radio Licensees and the SBCA wrongly assert that this proceeding does not constitute a controversy or uncertainty. There are at least three significant areas of controversy and uncertainty including: (i) whether the Satellite Radio Licensees possess the authority necessary to offer local traffic and weather programming either as an SDARS service or as an Ancillary Service; (ii) the distinction between “national” and “local” programming; and (iii) whether or not the Satellite Radio Licensees offer a “broadcast” service.

The Satellite Radio Licensees do not dispute that they have been authorized to provide a national broadcast service only and thus claim no controversy or uncertainty exists regarding their ability to offer local programming because they do not vary content by receivers, but rather deliver identical content to all locations.² This argument, designed to overcome the Satellite Radio Licensees’ multiple, previous commitments to providing a national-only service, implies that “local content” becomes “national content” simply because the information is transmitted nationally. The SCBA expands on this backward definition of localism by admitting that, “[f]rom a content perspective, while XM and Sirius offer some programming that may be of more interest to people in certain geographic areas than others, this does not convert the content of the programming from ‘national’ to ‘local’ in nature.”³

A suggestion that programming is not local in nature because it may be received across the continent is absurd. Content, not reception, must be the basis for localism or, for example, a

² Satellite Radio Licensees’ Opposition, p. 4.

³ SBCA Opposition, p. 8.

radio station streaming its programming on the Internet would become a “world-wide” service instead of local. SBCA shows its contempt for, or lack of understanding of, what a truly local broadcast service represents and its value to its community.

Thus, thunderstorms in Washington, D.C. and traffic jams in Los Angeles are not national news simply because the Satellite Radio Licensees decide to misuse valuable spectrum by reporting these events to distant locations, such as the unserved or underserved areas they promised to serve with beneficial and entertaining content when they received their licenses.⁴ In short, the Satellite Radio Licensees’ desire to “define away” this controversy should not deter the Commission from issuing a Declaratory Ruling to address XM and Sirius’s obvious circumventions of, and confusion about, the definition of localism. At the very least, the Satellite Radio Licensees and the SBCA’s assertions squarely place a controversy before the Commission – the meanings of “local” and “national” services. Indeed, it is instructive that many of the comments filed in this proceeding under the banner of “Feedback from an XM Supporter” are from satellite radio subscribers in areas that will likely never be served by localized programming from the Satellite Radio Licensees. One must question whether such subscribers are being misled about the nature and extent of localized programming that the Satellite Radio Licensees intend to provide.

The State Associations dispute whether the Satellite Radio Licensees possess the authority to broadcast weather and traffic programming as an “Ancillary Service.” When it granted Satellite Radio Licensees the authority to offer so-called ancillary services, which the Commission has described as “non-DARS” services, commentators said such services might include data services or the provision of specific song related information or emergency

⁴ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order*, 12 FCC Rcd 5754, 5791, ¶ 90 (March 3, 1997).

information.⁵ No mention of inherently local weather or traffic reporting appears in the “ancillary services” section of the Satellite Digital Audio Radio Report and Order (“SDARS Order”).⁶ Likewise, the Commission’s SDARS Notice of Proposed Rulemaking lacks any reference to local weather or traffic reporting, but instead mentions, “high-speed broadcast data or location-based geographic information, electronic graphic/visual information, voice mail, and alphanumeric messages on dedicated channels or in conjunction with (multiplexed into) the channels used for digital audio.”⁷ The Commission should reject summarily the Satellite Radio Licensees’ and SBCA’s unilateral reversal of their earlier depiction of “ancillary services,” or else hold the proceedings necessary to resolve this obvious controversy manufactured by them.

Even if such services are determined to be ancillary, commentators previously urged the Commission to allow ancillary services to “promote full and efficient use of the spectrum.” Using the nation’s limited spectrum resources to transmit local traffic and weather information to regions where it provides no conceivable benefit, and may, in fact, cause harm to the public, is far from promoting efficient spectrum use and is therefore contrary to the public interest. The Commission should grant the NAB petition in order to clarify the definition of “ancillary service,” so that these spectrum resources are properly used for the public, not private, interest.

Finally, the Satellite Radio Licensees and SBCA create a controversy about the meaning of “broadcast.” They repeatedly contend that the Satellite Radio Licensees offer “broadcast” content in support of their claim to provide local services.⁸ However, they offer a paid, subscription service which, by definition, is not over-the-air free broadcasting. It is incumbent upon the Commission to grant the NAB petition in order to determine the terms of the Satellite

⁵Ibid at 5792-5793, ¶¶ 94, 95 (1997) (“SDARS Order”).

⁶ Ibid at 5792, ¶ 94.

⁷ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking*, 11 FCC Rcd 1,10, ¶¶ 29,30 (June 15, 1995).

⁸ See for example Satellite Radio Licensees’ Opposition, p. 2; SBCA Opposition, p. 4.

Radio Licensees' service and whether it is the same as historic radio broadcasting, and if so, to apply the traditional broadcast public interest obligations to it, such as issue responsive local programming, restrictions on indecent content, and the obligation to provide localized emergency alerts and information to all areas of the country – not just to those large markets that the Satellite Radio Licensees have chosen to “cherry-pick.”

II. Satellite Radio Licensees' Carriage of Local Programming Does Not Promote the Public Interest.

Satellite Radio Licensees purportedly offer local weather and traffic programming to serve the public interest, yet the major metropolitan areas which are the targets of such programming are neither unserved nor underserved.⁹ In fact, listeners in the top 20 markets have access to a plethora of traffic and weather information. The Satellite Radio Licensees' traffic and weather programming instead serves only the private, pecuniary interest of XM and Sirius by creating the erroneous and misleading appearance that they are offering localized information throughout their service area, when in fact such services are strictly limited to the large markets which the Satellite Radio Licensees have chosen to serve. Adding additional traffic and weather reporting about just these few large markets, at the expense of listeners in all other locations, provides negligible, if any, public interest benefit and could in fact undermine the public interest by jeopardizing the 80-year history of local listeners' trust in the information delivered by local terrestrial broadcasters, which provide traffic and weather reporting while also satisfying many other public interest obligations which are ignored, and even rejected, by the Satellite Radio Licensees.

⁹For example Sirius Satellite Radio provides local traffic and weather programming in the country's largest markets: Chicago, Philadelphia, San Francisco-San Jose, Boston, Dallas-Ft. Worth, Washington, DC, Atlanta, Detroit, Houston, Seattle, Tampa-St. Petersburg, Phoenix, Miami-Ft. Lauderdale, Orlando, Pittsburgh, St. Louis, Baltimore and San Diego (See Sirius Satellite Radio Press Release, *Sirius Satellite Radio to Provide Traffic and Weather Information for Top 20 Markets*, February 27, 2004).

Indeed, this practice by the Satellite Radio Licensees could harm public confidence in the local service of legitimate local broadcasters by confusing listeners and, indeed, putting their lives in jeopardy. For the past 80 years, radio listeners have enjoyed the assurance that weather, traffic, and emergency information were delivered to them by their local radio station, and they could safely conclude that such reports applied to the area in which they received the broadcast. Now, however, a listener in an area outside those served by the Satellite Radio Providers' localized reports might run the risk of tuning in to a portion of, for instance, a report of severe weather conditions, thinking it applied in the listener's area, and taking appropriate precautions unnecessarily; or worse, listeners might tune in to such a report for their area, think it did not apply in their particular area since it was a "nationalized" report, and fail to take necessary precautions. Such potential confusion could put life and property at risk.

Satellite Radio Licensees oppose being subject to the daily public interest programming obligations required of terrestrial broadcasters, such as responsiveness to local issues, broadcast decency, candor requirements, and participation in the Emergency Alert System.¹⁰ The Satellite Radio Licensees vigorously opposed being subject to such public interest requirements during the SDARs proceeding, and the Commission decided not to subject these national services to traditional broadcast public interest obligations beyond political advertising and compliance with the Commission's equal employment opportunities requirements.¹¹ The Commission "reserve[d] the right to do so," but has not levied any additional public interest obligations on the Satellite Radio Licensees during the time since the service was authorized and the licenses were granted.¹² It is an affront to the public interest, and unfair, to permit the Satellite Radio

¹⁰ See SDARS Order at 5789, ¶ 86.

¹¹ SDARS Order at 5791 and 5792, ¶¶ 91-93.

¹² SDARS Order at 5792 ¶ 93.

Licenses to offer purportedly local services without holding them to all attendant public interest obligations.

III. The First Amendment Does Not Grant Satellite Radio Licensees a Special Right to Broadcast Traffic and Weather Alerts.

The Satellite Radio Licensees and the SBCA take the legally insupportable position that the First Amendment prohibits the Commission from applying any content regulation to the Satellite Radio Licensees.¹³ In making their bold claim, they ignore fundamental legal principles applied to all FCC licensees, that in return for the valuable right to use the public's spectrum, the Commission may apply license conditions, including -- of course -- the exact public interest obligations the Satellite Radio Licensees hope to dodge.

The Commission's statutory authority to limit SDARS license holders to offering national programming is clear and is not precluded by the First Amendment. Section 301 of the Communications Act of 1934 as amended states, "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license."¹⁴

FCC licensees, including the Satellite Radio Licensees, are granted the privilege to use the scarce, public airwaves subject to conditions which they freely and voluntarily accepted. The D.C. Circuit addressed this issue more than 70 years ago in *Trinity Methodist Church South v. Federal Radio Commission*, when it said,

"If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to

¹³ See SBCA Opposition, p. 14; Satellite Radio Licensees' Opposition, p. 13.

¹⁴ 47 U.S.C. § 301.

the other...then this great science [broadcasting] instead of a boon, will become a scourge, and the national theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights of the First Amendment or an impairment of their free exercise.”¹⁵

Trinity Church shows that the Commission is not just a regulator of the engineering and technical aspects of radio communications, but that Congress intended for the Commission to take a broad look at the programming offered by licensees to decide whether or not it is in the “public interest, convenience and necessity.”¹⁶

The Commission’s authority to regulate licensees in this way was articulated in *NBC v. FCC*.¹⁷ Responding to NBC’s allegations that the Commission’s Chain Broadcasting Regulations abridged the First Amendment, the Court said:

“If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”¹⁸

The Satellite Radio Licensees’ contention that the Commission lacks the constitutional authority to prohibit XM and Sirius from offering local programming is baseless. XM and Sirius each possess one of only two licenses available to offer Satellite Radio Services in the United States.¹⁹ Due to constraints on the very limited spectrum available for all manner of radio services, only two licenses were granted. As was discussed above, each of the individuals and companies who are denied the right to offer Satellite Radio Services as a matter of law, would have a First Amendment claim under the rationale advanced by the Satellite Radio Licensees and

¹⁵ *Trinity Methodist Church v. FCC*, 61 App.D.C. 311,313; 62 F.2d 850, 852 (D.C. Cir. 1932), *cert. denied*, 284 U.S. 685 (1932).

¹⁶ *See* 47 U.S.C. § 309.

¹⁷ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

¹⁸ *Ibid* at 226.

¹⁹ SDARS Order at 5812, ¶ 143.

the SBCA. Accepting such a position would create regulatory chaos, not only in satellite radio, but for all licensees.

Similarly, if the Satellite Radio Services choose to use their scarce, valuable spectrum to provided localized weather and traffic, they should be required to do so for all of the markets they serve, not just those large markets which represent the most likely return of profit. But such a requirement would be a gross waste of the valuable spectrum resource, insofar as it would replicate an extant service that has been provided to listeners, at no charge, for more than eight decades.

IV. Conclusion

The local traffic and weather reports provided by the Satellite Radio Licensees for the nation's largest markets are unauthorized, duplicative and contrary to the public interest. Such programming is neither an authorized DARS service, nor an authorized ancillary service, and should be prohibited by the Commission. XM and Sirius promised to provide programming to unserved and underserved areas of a national-only nature, yet instead they carry numerous channels of local, top-20 market traffic and weather information, which are duplicative in those markets and which are useless, confusing, and potentially dangerous to other listeners in the vast majority of locations not served by such localized reports. This practice is a waste of the nation's precious spectrum resources. Furthermore, opponents of the NAB's petition fail to show that this proceeding is without uncertainty and controversy. NAB's petition highlights several disputed issues including the authority by which Satellite Radio Licensees offer these services and the way in which the Commission defines "local" as opposed to "national" broadcasting. The contention that the First Amendment forecloses the Commission's ability to prevent Satellite Radio Licenses from offering local services is wrong. In light of the foregoing,

the State Associations urge the Commission to grant the NAB's Petition for Declaratory Ruling expeditiously in order to protect the public interest by ordering the Satellite Radio Licensees to cease provision of all purported local programming immediately while an appropriate record may be made and proceedings held, in order to make lawful determinations in the wake of the Satellite Radio Licensees' broken promises.

Respectfully submitted,

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Arizona Broadcasters Association
Arkansas Broadcasters Association
California Broadcasters Association
Colorado Broadcasters Association
Connecticut Broadcasters Association
Georgia Association of Broadcasters
Hawaii Association of Broadcasters
Illinois Broadcasters Association
Indiana Broadcasters Association
Iowa Broadcasters Association
Kansas Association of Broadcasters
Kentucky Broadcasters Association
Louisiana Association of Broadcasters
Maine Association of Broadcasters
MD/DC/DE Broadcasters Association
Michigan Association of Broadcasters
Minnesota Broadcasters Association
Mississippi Association of Broadcasters
Missouri Broadcasters Association
Montana Broadcasters Association
Nebraska Broadcasters Association
Nevada Broadcasters Association
New Jersey Broadcasters Association
New Mexico Broadcasters Association
The New York State Broadcasters Association, Inc.
North Carolina Association of Broadcasters
North Dakota Broadcasters Association
Ohio Association of Broadcasters
Oklahoma Association of Broadcasters
Oregon Association of Broadcasters
Pennsylvania Association of Broadcasters
Rhode Island Broadcasters Association
South Carolina Broadcasters Association
South Dakota Broadcasters Association
Tennessee Association of Broadcasters
Texas Association of Broadcasters
Utah Broadcasters Association
Vermont Association of Broadcasters
Virginia Association of Broadcasters
Washington State Association of Broadcasters
West Virginia Broadcasters Association
Wisconsin Broadcasters Association
Wyoming Association of Broadcasters

CERTIFICATE OF SERVICE

I, Reginal J. Leichty, hereby certify that on this 21st day of June 2004, served a true and correct copy of the foregoing by Electronic Mail, upon the following:

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